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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH MARTIN, Defendant and Appellant.	A144799 (Contra Costa County Super. Ct. No. 051318674)

I. Introduction

Appellant, a former elementary school teacher, was convicted by a jury of 17 counts of lewd conduct with boys under the age of 14 (Pen. Code § 288, subd. (a))[1] and two counts of lewd conduct with a boy who was 14 or 15 when appellant was more than 10 years his senior (§ 288, subd. (c)(1)). He was sentenced to an aggregate 12-year prison term. In this court, appellant contends the trial court committed reversible errors by admitting expert testimony regarding (1) the "profile" of a sex offender; (2) the immutability of a sexual attraction to young children; and (3) the low percentage of child sex abuse allegations that turn out to be false. Appellant further contends he was prejudiced by improper remarks the prosecutor made during his closing argument. We reject these contentions and affirm the judgment.

[1] Subsequent statutory references are to the Penal Code, unless otherwise indicated.

II. Case Overview

A. Procedural Background

Appellant taught fourth and fifth grade at Woodside Elementary School for several years until April 2013, when he was placed on administrative leave after a former student reported that appellant had been touching him in an inappropriate way. An investigation ensued, and other boys came forward.

A July 2013 felony complaint charged appellant with committing 91 violations of section 288 between 2005 and 2013 against 11 boys, who were named as John Does. Eighty-nine charges were for violating section 288, subdivision (a) (section 288(a)) by committing lewd acts on a boy under the age of 14. Appellant was also charged with two counts of violating section 288, subdivision (c)(1) (section 288(c)) for committing lewd acts against a boy who was 14 or 15 when appellant was at least 10 years older than the boy. The number of victims and charges increased as the investigation continued.

A February 2014 amended information charged appellant with 145 violations of section 288(a) and five violations of section 288(c) involving 14 alleged victims. Appellant's first jury trial was held in the summer of 2014. Of the 150 charges, 34 were dismissed before the case was submitted, the jury found appellant not guilty of 21 counts, and it failed to reach a unanimous verdict as to the remaining 95 counts.

A November 2014 second amended information charged appellant with 24 violations of section 288(a) and two violations of section 288(c). The crimes were allegedly committed between August 2007 and April 2013 against nine John Doe victims. Each named victim had been appellant's student, but many charges were based on conduct that allegedly occurred after the boy completed appellant's class.

A second jury trial was held between November 2014 and January 2015. The evidence was extensive and the defense vigorous. The John Does described interactions with appellant when he rubbed their bare chests and touched several of them in other intimate ways. Appellant testified that he had close relationships with many of his students but steadfastly denied allegations of inappropriate touching with lewd intent. Both sides presented expert testimony and circumstantial evidence. Ultimately, appellant

was convicted of 17 violations of section 288(a) and two violations of section 288(c). The jury was unable to reach a unanimous verdict as to five counts, as noted below.

B. Factual Background

Appellant does not challenge the sufficiency of the evidence to support his convictions. Accordingly, we limit our factual overview to a summary of the conduct that gave rise to the charges against appellant as presented to the jury by the nine John Does (hereafter, Doe 1 through Doe 9).

1. Appellant's 2005 Fourth Grade Class

Eighteen-year-old **Doe 6**, the oldest victim who testified at trial, was in appellant's 2005 fourth grade class. Appellant was convicted of committing five lewd acts with Doe 6 between 2007 and 2011.

Doe 6 described a relationship with appellant that developed over several years. He recalled enjoying his fourth-grade class and liking appellant as a teacher. In fifth grade, he had a different teacher but often stopped by appellant's classroom. In sixth grade, he went to a different school, but appellant became his regular tutor and continued to tutor him through eighth grade. Doe 6's mom died when he was in sixth grade and after that he became much closer to appellant. That close relationship lasted until his sophomore year in high school. They spent time together every week and talked on the phone often; they did recreational activities; and they participated in local theatre together. Doe 6 had regular dinners at appellant's house and slept over on occasion.

Appellant also wrote poems for Doe 6 and sent him letters on a regular basis. In one letter, appellant said he enjoyed "every minute" he spent with Doe 6, that he could really understand Doe 6 because the two of them were so much "alike," and that Doe 6 was "the most fascinating and best kid" that appellant had ever met. Doe 6 testified these were common themes in appellant's letters. In another letter, appellant said he gave Doe 6 a card and candy on Mother's Day because it was a hard day for Doe 6 and because it gave him an "excuse" to spoil him. Doe 6 testified that appellant did spoil him with candy, notes and cards.

Doe 6 testified that appellant touched him in the following ways during the period from sixth grade until Doe 6's freshman year in high school. First, appellant put his hand inside Doe 6's shirt. This behavior usually happened in appellant's classroom or appellant's house. Appellant would reach over Doe 6's shoulder, put his hand down the front of his shirt and pat his chest. Doe 6 estimated that appellant did this to him approximately 5 times a month, and he was confident that it happened in appellant's classroom more than two times a year when Doe 6 was in sixth, seventh and eighth grade. Second, appellant rubbed up and down on Doe 6's legs, using both his hands and usually going no further up than mid-thigh. But Doe 6 recalled one time when appellant was rubbing Doe 6's legs and brushed up against his private area. Doe 6 was startled and pulled away. He could not remember if appellant had said this contact was accidental. Third, at least twice, appellant gave Doe 6 a back massage while Doe 6 was shirtless on appellant's bed. Fourth, appellant would have Doe 6 take off all his clothes except his shorts and then weigh him on a bathroom scale. Fifth, until the middle or end of eighth grade, every time appellant saw Doe 6, he would cradle him in his arms and carry him around.

Doe 6 recounted some interactions with appellant that seemed strange. One time when appellant was visiting his home, Doe 6 asked appellant to leave the bedroom because he wanted to change his clothes. Appellant had a negative reaction, asking why he had to leave when he had seen Doe 6 change clothes in the dressing room when they had been in plays together. Another time, there was a plan for appellant to pick up Doe 6, so he could spend the night at appellant's house while Doe 6's father and brother went on a trip. As a "prank," Doe 6 put a note on his front door stating that he decided to go on the trip with his family. Doe 6 was hiding behind a tree when appellant arrived, read the note and then went into Doe 6's house. Doe 6 watched through a window as appellant went into his bedroom, looked through one of his drawers and then sat on the bedroom floor. Doe 6 waited twenty minutes before deciding to go to the door and call out to appellant. Doe 6 testified that appellant may have offered some explanation for this behavior, but in his mind, it was never explained.

Doe 6 recalled that when he was in fifth grade, he thought appellant's touching behavior was "a little bit weird," but after Doe 6's mother died, appellant was so good to him that he just did not care and stopped thinking about it. Then, when he got to high school, he started thinking about how "weird" the behavior was, and his friends often made negative comments about his relationship with appellant. Then, two incidents occurred while he was a sophomore in high school that significantly increased his concerns about appellant's behavior.

First, Doe 6 decided to talk to appellant about some physical issues he experienced when he lost his virginity the previous year. Appellant responded by asking if Doe 6 was gay. Doe 6 told appellant that he knew he was not gay, but appellant continued to pursue the matter, asking if Doe 6 had ever considered being intimate with an older man, which made Doe 6 very uncomfortable because appellant was an older man. After that conversation, appellant started keeping more of a distance. Second, Doe 6 had a conversation with his brother, Doe 5, about appellant's conduct. When Doe 6 learned that appellant had been giving Doe 5 back massages with his shirt off, and putting his hand down his shirt, red flags went up. After these two incidents, when appellant tried to contact Doe 6, usually through texting, Doe 6 did not respond.

2. Appellant's 2007 Fourth Grade Class

Doe 8, who was sixteen when he testified at trial, was in appellant's 2007 fourth grade class. Appellant was convicted of committing three lewd acts with Doe 8 during the period between 2008 and 2011.

Doe 8 described appellant as one of his favorite elementary school teachers. Appellant made him feel special by sitting close to him during story time, calling him his teddy bear and giving him hugs whenever they met outside of class. Appellant became friends with Doe 8's family, having them over to dinner several times. Doe 8 had a different 5th grade teacher but continued to spend time with appellant in his classroom after school. After Doe 8 left Woodside to attend sixth grade, the visits continued; appellant would call Doe 8's mom and arrange visits so they could play basketball or chess at school.

Doe 8 testified that between fifth and eighth grade, during almost every after-school visit, he sat on appellant's lap and looked at emails on the computer while appellant gave him a massage. Appellant would put his hands inside the collar of Doe 8's tee shirt, rub his back and chest, and then rest his hands on Doe 8's stomach or chest. During these visits, appellant also measured and weighed Doe 8. He told Doe 8 that his classroom scale would send waves through Doe 8's body to measure his body fat if he took off his shirt, shoes and socks. Also, appellant would pick Doe 8 up in a fireman's hold and carry him around the classroom. Doe 8 recalled that appellant often talked to him about Doe 6. He told Doe 8 about Doe 6's life, and about things appellant did that Doe 6 enjoyed, including carrying Doe 6 around and giving him massages. Appellant also talked to Doe 8 about growing up, and body changes and asked whether he was growing pubic hair. During these visits, the classroom door was closed and locked.

3. Appellant's 2009 Fourth and 2010 Fifth Grade Class

Doe 1, Doe 2, Doe 9 and Doe 5 were in appellant's 2009 fourth and 2010 fifth grade class. All four boys were 14 when they testified at trial.

The jury was unable to reach a unanimous verdict about whether appellant committed a lewd act against **Doe 1** between 2009 and 2010, but they convicted him of committing a lewd act against Doe 1 sometime between 2010 and 2011.

Doe 1 testified that he liked appellant as a teacher and enjoyed being in his class. He would surprise the class with "magic mornings," decorate the classroom to highlight seasons and holidays, and play with kids at recess. The class spent part of every school day gathered in a carpeted area of appellant's class room, some sitting in chairs and others on the floor. The area was used for class meetings, doing school work and watching movies on the TV. During these activities, appellant sat in a chair with the group, and some students, including Doe 1, would try to sit near him. Doe 1 recalled sitting on the floor in front of appellant with his back against appellant's legs and hands. Doe 1 also spent time with appellant after school, attending his homework club. Near the end of fifth grade, appellant invited the kids in Doe 1's class to come back and visit him. After Doe 1 left Woodside to attend sixth grade at another school, he and some other

friends visited appellant after school. Most of the time, Doe 1 and his best friend Doe 2 went together to visit appellant and play basketball with him. These visits continued until halfway through seventh grade.

Doe 1 testified that when he was in fourth and fifth grade, appellant touched him in the following ways: When they were in the circle area on the carpet, and Doe 1 was sitting on the floor in front of appellant, appellant would reach over Doe 1, put his hand down the front of his shirt and rub his nipples and massage his shoulders. Appellant's hand would move down as far as the belly button and he would also pat Doe 1 on the chest. Doe 1 estimated that this happened to him as many as fifteen times in fourth grade and twenty or more times in fifth grade. Also, when Doe 1 was working at a computer, appellant would put his hand inside Doe 1's shirt in the same way. Doe 1 estimated that this happened five times in fourth grade and five times in fifth grade. Doe 1 recalled that when he was in fourth or fifth grade, he saw appellant put his hand down the shirts of Doe 2, Doe 5 and Doe 9. He did not talk to the boys about it at the time.

Doe 1 testified that when he was in sixth and seventh grade, appellant touched him and Doe 2 during their after-school visits. The three of them would play basketball and then go to appellant's classroom and play cards or a board game. Appellant would situate himself so that he could put his hand inside the shirt of one of the boys. Sometimes, he touched both boys during the same visit, and other times he seemed to switch off between them. Doe 1 estimated that the touching happened approximately 30 times when he was in sixth grade, and approximately 20 times when he was in seventh grade. He recalled one incident when he and Doe 2 visited appellant while they were in seventh grade. They were in the classroom talking and appellant was touching one of them inside their shirt, when appellant started to ask them about whether they had "started growing hair and stuff." Doe 1 recalled the incident made him feel "kind of weird because nobody really talks about that stuff."

Appellant was convicted of committing two lewd acts against **Doe 2** between 2010 and 2012.

Doe 2 testified that appellant was a great fourth and fifth grade teacher; he made school fun, decorated his classroom, threw parties and complimented his students. Doe 2 recalled "hanging out" with appellant after school when he was in fifth grade and sixth grade. He and Doe 1 played basketball with appellant on the blacktop and then went to his classroom to play a game. Doe 2 testified that during "most" of the visits appellant put his hand down Doe 2's shirt. Doe 2 recalled that appellant would somehow position himself so that he was next to Doe 2 or pull Doe 2 onto his lap as he was asking about how life was going, and then he put his hand over Doe 2's shoulder and down his shirt, and then used his fingers to rub Doe 2's nipple. Doe 2 saw appellant do the same thing to Doe 1 during their after-school visits, but he did not recall seeing appellant touch Doe 1 in this way during the school day. He and Doe 1 talked about this conduct once or twice and agreed that it was "weird."

Appellant was convicted of committing two lewd acts against **Doe 9** between 2010 and 2011.

Doe 9 testified that appellant's class "outshined" the other classes he has had. Activities he enjoyed included baking, singing and playing music on the computers. In fourth and fifth grade, he was not close with Doe 1 or Doe 2, but they were friends. He was closer to Doe 5, but he did not hang out with any of these boys after he completed fifth grade and went to a different school. Doe 9 recalled that appellant treated his students "kindly" by giving them treats and gifts, giving lots of hugs, and giving "hug[s] from behind, patting on the back, rubbing." Doe 9 received front and back hugs from appellant and recalled that appellant would pick him up and give him a bear hug. Appellant also gave him massages by rubbing his shoulders.

Doe 9 recalled that appellant's class would have circle time on the carpet, when the kids would gather to sing or have discussions about their conflicts. The carpet area was also used for games and school work. Appellant told the kids if they had a problem with him, they should come and talk to him privately first rather than telling a parent or the principal. The kids had assigned seats on the carpet, which changed over time, and one of Doe 9's seats was in front of appellant. Depending on the activity, Doe 9 would

be seated on the floor with legs crossed facing appellant who was sitting in a chair, or Doe 9 would have his back against the chair in between appellant's legs with his head near or against the seat of appellant's chair. During movie times, there was a similar arrangement where appellant sat in a chair and Doe 9 typically sat on the floor in between appellant's legs.

Doe 9 testified that appellant often asked him to stay after school and play chess. After school, they also looked at videos on the computer while Doe 9 sat on appellant's lap. Then appellant would drive Doe 9 home. Some visits were scheduled in advance by appellant and other times he would call Doe 9's home after school or on a weekend day and ask him to come for a visit. These meetings continued through sixth and seventh grade. During this time, Doe 9 also visited appellant's house as many as five times. He went there to play tennis, watch movies and eat, and he also had a sleep over there with Doe 5. Appellant sometimes gave Doe 9 gifts, like toys or money for his birthday. In seventh grade, Doe 9 started to feel uncomfortable about his relationship with appellant, who was always calling him and taking up a lot of his time.

Doe 9 testified that when appellant's class watched movies, appellant often rubbed Doe 9's shoulders and then put his hands down Doe 9's shirt and rubbed his chest or nipples. Appellant also massaged Doe 9's chest in this way while they watched videos on the computer after school. Doe 9 could not remember if these massages started in fourth or fifth grade, but they continued until Doe 9 stopped visiting appellant when he was in seventh grade.

Appellant was convicted of committing four lewd acts against **Doe 5** between 2009 and 2013.

Doe 5 testified that appellant was affectionate with all his students, that he routinely greeted Doe 5 with a hug and would hug him throughout the day. On Fridays, appellant did an activity called conflict resolution, when students had the opportunity to bring up a problem with another student or with appellant and then the two people would go outside and "fix" it. Appellant encouraged students to go straight to him with problems because involving parents was a bad idea for some reason. Doe 5 testified that

his family had a close relationship with appellant spanning several years. Appellant had previously taught Doe 5's brother, Doe 6, and was close with both boys. When Doe 5 was assigned to appellant's fourth grade class, appellant told him that he did not want the other students to think Doe 5 was a teacher's pet because that had happened to Doe 6. So, appellant did not give Doe 5 special attention during school, but he did give him more attention outside of school.

Doe 5 was in second or third grade when he first started spending time alone with appellant. Every week, Doe 5 and Doe 6 would alternate having visits with appellant after school. The visits continued until Doe 5 was in the sixth or seventh grade. During some visits, Doe 5 stayed at school with appellant and did homework, played basketball, or played games in the classroom, and then appellant would drive him home. When they watched videos on the class computer, Doe 5 sat on appellant's lap. During these after-school visits in the classroom, Doe 5 was always alone with appellant, and the door was locked. During some visits, appellant took Doe 5 to his house to watch a show or play on the computer. Sometimes they played tennis or went swimming. Appellant's wife would make dinner for Doe 5 and then appellant would drive him home. In addition to their scheduled meetings, appellant and Doe 5 did things together on special occasions, like birthdays. Finally, while he was in fourth or fifth grade, Doe 5 had a few sleepovers at appellant's house, sometimes with other boys from his class.

Doe 5 testified that starting when he was in third grade and continuing until the visits stopped in seventh grade, almost every time he visited appellant's home, appellant put his hand inside Doe 5's shirt, massaged his chest and squeezed his nipples. This would happen in appellant's bedroom, while Doe 5 sat on appellant's lap in front of the computer and watched YouTube videos. Appellant also gave him back massages when the two of them were alone in appellant's bedroom. Doe 5 would take his shirt off and lie on his stomach on appellant's bed and appellant would use his hands or a device to administer a massage. In addition, every month, appellant would have Doe 5 take off his shirt and socks and measure his height and weight to see if he was having a "growth spurt." Doe 5 recalled there were times when appellant brought him home at night and

appellant would go in to Doe 6's bedroom and watch him sleep for a long time, which seemed weird.

Doe 5 testified that by the time he was in sixth grade he started to think that these activities with appellant were "weird," and he talked about it with Doe 6, who said he also experienced this behavior with appellant and thought it was weird. Doe 5 was concerned that talking to other people about what was going on might cause a fight or some other trouble. He started making excuses to avoid meeting with appellant and when they were together he would try to block appellant's hand from going up his shirt.

4. Appellant's 2012 Fifth Grade Class

Doe 3, Doe 4 and Doe 7 were in appellant's 2012 fifth grade class the year he was suspended from teaching. At the time of trial, Doe 4 and Doe 7 were thirteen and Doe 3 was twelve. Appellant was convicted of committing two lewd acts against Doe 4 between 2012 and 2013, but the jury was unable to reach unanimous verdicts as to parallel charges involving Doe 7 and Doe 3.

Doe 4 testified that he enjoyed appellant's class and the fun activities he did with the students. He recalled that appellant showed kindness by giving students hugs, helping resolve problems so parents did not have to get involved, and giving compliments to students. Doe 4 felt that he got special attention from appellant, who often invited him to stay in at recess or stay after school. Also, appellant said that he loved Doe 4 and asked if Doe 4 loved him. Initially, Doe 4 liked getting hugs from appellant, but when they became more frequent and happened during lunch or after school, Doe 4 started to feel they were weird. As the school year went on, appellant also said he loved Doe 4 more frequently. He would give Doe 4 a post-it-note on which he wrote one of two questions, either asking if Doe 4 knew that appellant loved him of if Doe 4 loved appellant. Doe 4 was supposed to circle "yes" or "no" on the note.

Doe 4 testified that he was bothered by two other things that appellant did to him. The first thing happened when the class sat in a circle and read from their textbooks. When appellant sat next to Doe 4 and shared his textbook, the book would be resting on Doe 4's leg and appellant would slide his hand near Doe 4's "privates." When his hand

got "really close," Doe 4 would move the book, so appellant would take his hand away. Doe 4 estimated that this happened a total of six or seven times and that twice appellant actually touched his privates. When the prosecutor asked if appellant ever talked to him about the "hand under the book thing," Doe 4 recalled that about a month before appellant left the school, he asked Doe 4 to stay after class and asked if everything was okay or may have even asked if he had touched Doe 4's privates. Doe 4 was not sure but thought he may have responded that appellant did not touch him.

The second thing appellant did that made Doe 4 uncomfortable was that he'd put his hand down Doe 4's shirt. This happened when the class watched TV. Appellant and some students sat in chairs, while the rest of the students sat on the floor in front of them. Doe 4 was assigned a seat on the floor in front of appellant, appellant would put his hand inside Doe 4's shirt, place it on his shoulders, back and chest, and rub. Doe 4 estimated that this happened to him four times. He did not think other students saw appellant do this to him, pointing out that the classroom lights were turned off during this activity. The last time this happened to Doe 4 was the last day that appellant taught his class. They were five minutes into a movie and appellant had put his hand inside Doe 4's shirt when the school nurse came and called appellant out of the room.

Doe 7 testified that he enjoyed being in appellant's class and the special activities he did. He recalled that appellant was nice to all his students and affectionate with those who said they were comfortable with it. Doe 7 and appellant exchanged hugs daily and appellant often picked Doe 7 up when he hugged him. Appellant was always really nice to Doe 7, made him "feel great" and was "just the best teacher." He told Doe 7 that he was his favorite student, called him his "school son," and spent time with him away from the school. And he encouraged Doe 7 to get involved in local theatre, which became a passion.

Doe 7 recalled that on the last day that appellant was his teacher, he was called out of the class and then returned to tell the students he was leaving because of a family emergency. Doe 7 was very upset and gave appellant a hug goodbye. Doe 7 usually stayed after class to talk with appellant, but that day he had to leave with the other

students. As the students left, appellant asked Doe 4 to stay and talk with him. Doe 7 waited for Doe 4 to come out and asked what had happened. Doe 4 told Doe 7 that appellant had asked whether appellant had "touched" him. Doe 7 testified that he did not think Doe 4 told him anything else about that conversation. However, about a month later at an Open House event for the school, Doe 4 came up to him and said that appellant was a molester. Doe 7 could not make sense of that remark at the time, but later that night he talked to his mom about it and then he remembered how appellant used to put his hand down Doe 7's shirt during reading time and touch him on the chest. Doe 7 estimated that this happened to him "maybe 20 times." He could not recall a specific occasion, but described how the students would be reading and then appellant "would just kind of put his hand down my shirt and kind of scratch my chest . . ." The first time this happened, Doe 7 may have thought it seemed unusual, but then it was just "normal," and felt good and did not bother him at the time. Doe 7 saw appellant do this to other students as well, like Doe 3 and perhaps another boy, John Doe 11.

Doe 3 testified that he was glad when he learned that he would be in appellant's fifth grade class because appellant threw a lot of parties. He was equivocal about whether he enjoyed appellant's class, but he did enjoy the parties and described some other "fun" activities. Appellant was nice to the students and gave them hugs and pats on the back. Appellant gave Doe 3 hugs and made him feel special by telling him that he was appellant's number one student. Appellant also encouraged Doe 3 to pursue his singing talent and gave him a lead in a class play.

When the prosecutor asked if appellant ever did anything that was "weird" or "uncomfortable," Doe 3 testified that appellant reached his hand down Doe 3's shirt. Doe 3 did not know how long appellant's hand would be inside his shirt, but he testified that appellant would move it all around his chest, and he demonstrated for the jury that appellant's hand would move down as far as his sternum. Doe 3 estimated that this happened to him five or six times when the class was doing reading circle or watching a movie. The last time it happened was during a movie they watched on the last day that appellant taught his class.

Doe 3 testified that he felt "weird and uncomfortable" when appellant put his hand down Doe 3's shirt. The first time it happened, Doe 3 "moved to the side a little," and at other times he "shoved to the side." Doe 3 was too nervous to say something to appellant when this happened, but he and his friends had talked about it and they were thinking about saying something during a conflict resolution meeting. However, appellant ended up leaving the school before anything was said.

Doe 3 testified that he saw appellant put his hand down the shirt of other students in his class during reading or movie time. He recalled seeing appellant put his hand down the shirt of Doe 4 four times, and down the shirt of Doe 7 three or four times. He also saw appellant put his hand down the shirt of another classmate, John Doe 11.

III. Expert Witness Testimony

As noted, both sides presented expert evidence. During the People's case, Dr. Anthony Urquiza testified about a syndrome experienced by child victims of sexual abuse commonly referred to as Child Sexual Abuse Accommodation Syndrome (Accommodation syndrome), and Dr. Caprice Haverty testified about men who are sexually attracted to children. The defense expert, Dr. Annette Ermshar, testified about memory and suggestibility, social conformity, and false allegations of sex abuse. Appellant contends the trial court erred by permitting the two prosecution experts to offer opinions on improper and/or irrelevant matters.

"A witness may testify as an expert, in the form of an opinion, on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (Evid. Code, § 801, subd. (a).)" (*People v. Jackson* (2013) 221 Cal.App.4th 1222, 1237.) "[A]lthough ordinarily courts should not admit expert opinion testimony on topics so common that persons of ' "ordinary education could reach a conclusion as intelligently as the witness" ' [citation], experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony. [Citation.] . . . [T]he pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury." (*People v. Prince* (2007)

40 Cal.4th 1179, 1222.) "We apply an abuse of discretion standard in reviewing a trial court's decision to admit the testimony of an expert." (*Ibid*.)

A. Background

1. Dr. Urquiza's Testimony

Dr. Urquiza is a psychologist, professor of Pediatrics and director of the CAARE Center, a child abuse treatment program at U.C. Davis. At trial, he was qualified as an expert in child sexual abuse, on subjects including Accommodation syndrome, suggestibility, false reporting and false memories.

Dr. Urquiza explained to the jury that Accommodation syndrome is not a diagnostic tool but a methodological tool for understanding and treating child abuse victims. There are five components of the syndrome, which researchers have identified as common characteristics with child abuse: secrecy; helplessness; entrapment and accommodation; delayed and unconvincing disclosure; and retraction. These characteristics are indicative of the ongoing close relationship most victims have with their abusers. Some of these characteristics are counterintuitive and help explain behavior by the victim that appears to be inconsistent with abuse. Some characteristics, like secrecy and helplessness, are things that all children may experience, but in this context, they mean that children tolerate and hide their abuse because of the nature of their relationship with the abuser whose manipulative strategies are integral to the abuse.

Urquiza testified about research showing that child molesters engage in purposeful conduct with both their victims and other members of their community, so they can create environments in which the abuse is possible. For example, before a molester engages in sexual touching, there is a "grooming" period when the child is systematically desensitized so that the child will be more comfortable with sexual overtures, sexual talk and, ultimately, sexual abuse. Also, because "[b]eing nice and friendly, outgoing, engaging, opens a lot of doorways," abusers create this façade not just for the child, but for others in the community as well.

Urquiza testified that when talking about false reports of sex abuse, it is important to distinguish between a false memory and a false allegation. A false memory could be

the result of suggestibility. Although a person of any age can be suggestible, the research indicates that this concern arises primarily with pre-school children. Urquiza testified that false memory research is difficult to conduct, especially as it relates to child sex abuse, and that there is not much data on the subject.

Urquiza stated he was familiar with research about false allegations of child sex abuse, but he was reluctant to opine about the number of cases in which reports of sex abuse turn out to be false. As Urquiza explained to the jury: "I would be reluctant to say a specific percentage, you know, X percentage of kids make false allegations of sexual abuse, because we just don't know enough about that. I think a range is better, and a range would be a range of what the current studies reflect, and that range really falls, at least in my opinion, to: Do false allegations happen? Yes. Do they happen often? No." Urquiza continued: "I think it's a very rare or infrequent occurrence, given the data that we have on sexual abuse, which has—that range roughly from about one percent to eight percent of cases that we know about, where a child made an allegation that was determined to be false." Urquiza opined that the best study was done in Canada, which concluded that either four or six percent of sexual abuse allegations are determined to be false, and most of those cases involved custody disputes.

2. Dr. Haverty's Testimony

Dr. Haverty, a forensic psychologist with 25 years' experience evaluating and treating sex offenders, was qualified as an expert on the subject of men who are sexually attracted to children. Haverty testified that as a treatment provider, it is important to understand the motivating factors and etiology of adult sexual attraction to children. For example, a man may have "a primary arousal" to children under a certain age or within a given age range. Other motivating factors include a low capacity for self-regulation, substance abuse, or an adverse childhood experience or trauma. Some offenders are "opportunistic," in that they are not primarily sexually aroused by children, but they are under great stress, or are angry, and they do not know how to get help, so they attempt to self-soothe by using a familiar child. Incest offenders are another distinct category

because they do not necessarily have a primary sexual orientation toward children generally.

Haverty shared with the jury definitions of terms used by researchers in this field. A pedophile is an adult with a primary sexual interest in a child that exceeds his or her sexual interest in adults. Paraphilia is "an intense and recurrent, ongoing desire toward an object of sexual arousal that would be considered abnormal," which would include pedophilia as well as other behavior like peeping or voyeurism. Haverty opined that while some men have a sexual attraction to children in a specific age category, others blend the age categories or are attracted to "anyone that can't, by age, by definition, consent."

According to Haverty, there is no definitive answer as to what causes adults to be sexually attracted to children, but research suggests there may be a neurological explanation and that pedophilia is comparable to and just as strong as conventional sexual orientation, like heterosexuality or homosexuality, and that it is a life-long sexual interest that cannot be cured, but men do not have to act on it and many don't. As a treatment provider, Haverty believes that men with sexual attraction to children can get better; although they cannot change their pedophilic orientation, they can learn to manage it and not act out with children.

Haverty opined that advances in the treatment of adults with a sexual attraction to children has helped to decrease sexual crimes, but this work is impeded by false stereotypes. For example, Haverty believes that residency restrictions prohibiting offenders from living near places where children congregate can be more harmful than beneficial. These restrictions assume that child molesters are strangers who go to parks and schools and target young children but, according to Haverty that is rarely true, "maybe one, two percent of the time." Furthermore, residency restrictions can cause stress and isolation, which are often triggers for sexual molesting.

Haverty testified that the notion that there is a type of man who looks like a child molester is laughable, explaining: "If I showed you the men that I'm working with, they're young, and they're old, and they're middle aged, and they're handsome, and

they're creepy looking, and they're rich, and they're poor, and they're middle class, and they're black, and they're white, and they're Hispanic, and they're—and they're thugs on the streets, and they're, you know, sitting on Wall Street. I mean, I've had a gamut. [¶] So it's really hard to say, 'That looks like a sex offender,' but we do have that stereotype, and I once had that as well." Haverty opined that two to five percent of men "tend to have a sexual orientation toward children." A person can have a sexual interest in adults and in minors but usually one or the other is primary. Also, a pedophile tends to prefer boys or girls, but there can be cross-over.

Haverty testified there is a wide range of sexual behaviors by men who are attracted to children, from observations for purposes of gratification, to fantasizing during masturbation, to "any degree of touching," to intercourse or other forms of penetration. Some men are violent and predatory, while others are "incredibly compassionate," and can use that compassion to manipulate the relationship. And there are men who do not act on their attraction at all. Men who fall into a middle range, who act on their attraction but are not violent or physically forceful, can have patterns or "M.O.s." These men are willing to offend but may not want to engage in intercourse or sodomy or oral copulation because they do not want to harm the child or believe the child is not mature enough physically. There are many reasons these men do not necessarily take every opportunity to offend, including that the child has not been "groomed" well enough or they are afraid of discovery or retribution.

During cross-examination, Haverty confirmed that in the psychological community, there is no common stereotype or profile of a child molester. Defense counsel offered the hypothetical of a person who gives a child a scalp massage. Counsel suggested that while a molester might do this to get sexual gratification, there are other intentions for an adult to give a child a scalp massage and, therefore, it would be "unscientific" to conclude that a person who gave a child a scalp massage was a molester. Haverty agreed.

3. Dr. Ermshar's Testimony

Dr. Ermshar is a clinical and forensic psychologist. Prior to trial, the court granted defense motions to admit Dr. Ermshar's expert opinions regarding (1) factors that can cause memory to be influenced by suggestion; and (2) "social conformity," as influenced by rumors and gossip. Ermshar was also qualified as a rebuttal witness to address the prosecution's expert evidence regarding Accommodation syndrome.[2]

Ermshar testified about the nature of memory and factors that can affect its reliability. For example, suggestibility is a process by which one person's memory is influenced by the memories or experiences of other people. When a person is questioned about a past event, his or her memory may be influenced by suggestive leading questions, or by repetitive questioning that leads him to believe there is only one acceptable answer. An interviewer with a preconceived notion of what the answers should be may conduct a "single hypothesis" or a "confirmatory bias" interview, which is more likely to elicit the answers he or she wants. Ermshar opined that completely false memory can be implanted, but it is easier to modify or embellish an actual memory through suggestibility and, once the memory is implanted, it is difficult to convince the person that it is untrue.

Ermshar discussed how the concept of "social conformity" can affect a person's opinions and memories. Many factors can come into play. For example, a dominant personality in a social group may share an opinion or rumor, which others in the group will be inclined to accept. Preconceived stereotypes or notions of morality can reinforce the inclination to conform to the group position.

Ermshar discussed research into various aspects of child abuse. She testified there have been many studies about false accusations of child abuse, but it is very difficult to conduct useful research regarding the number of false accusations. The results of studies that have been performed vary widely. At one extreme, there was a report that false

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[2] In overruling the prosecutor's objections to this witness, the trial court found that alleged flaws in her opinions could be addressed adequately through cross-examination, although it did impose a pre-trial order precluding the use of the term "group hysteria."

allegations are as low as 4 to 5 percent, while another report conducted in 1996 concluded that 50 percent of sex abuse allegations were unfounded, and 30 percent were not substantiated. From these statistics, Ermshar concluded: "So to me that is between sort of 4 and 80 percent. That's a huge range. Somewhere in there is truth, but where, it's hard to know."

Ermshar testified there has been considerable research attempting to determine whether there is a reliable profile of a pedophile, "[b]ut the answer is largely no . . . . There is no profile of such individual."

Ermshar was critical of Accommodation syndrome as a concept because it is not a diagnostic tool. She also opined that it violates the scientific rule of causes because the fact that child abuse can cause certain behaviors in a victim does not mean that a child who exhibits those behaviors was abused. In the absence of confirmed abuse, there may be other explanations for a child's behavior. For example, the fact that a child delayed reporting abuse does not mean that the "molest must have occurred." In some contested cases, "[o]ther things could have happened during that delay. Memory erodes over time, things, people are suggestible, stories get created, stories get altered, and those types of things may have occurred during the delayed period."

B. Haverty's Testimony was Admissible

Appellant first contends that Dr. Haverty should not have been allowed to testify at trial because her testimony constituted improper profile evidence.

"A profile ordinarily constitutes a set of circumstances—some innocuous—characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile. (*People v. Prince, supra,* 40 Cal.4th at p. 1226.) Profile evidence "is not a separate ground for excluding evidence; such evidence is inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (*People v. Smith* (2005) 35 Cal.4th 334, 357.) Profile evidence is objectionable as lacking sufficient probative value when "the conduct or matter that fits the profile is as consistent with innocence as with guilt." (*Id*. at p. 358.)

Here, we reject appellant's characterization of Dr. Haverty's testimony as improper profile evidence. As discussed above, Haverty expressly testified that there is no valid profile of a child molester, no fixed set of characteristics for identifying an adult who is sexually attracted to children. Moreover, she did not draw any conclusions about appellant or his characteristics.

Appellant insists that Haverty's testimony should have been excluded pursuant to *People v. Robbie* (2001) 92 Cal.App.4th 1075 (*Robbie*). The *Robbie* defendant was convicted of kidnapping sixteen-year-old Jane Doe for a sexual purpose, oral copulation and penetration with a foreign object. At trial, the jury heard conflicting testimony about whether defendant's encounter with Jane Doe was consensual. The prosecution also presented expert testimony from a special agent employed by the California Department of Justice (DOJ) regarding " 'the behaviors and conduct of persons who commit sexual assaults.' " During the agent's testimony, the prosecutor asked her to consider various kinds of conduct by posing hypothetical questions, which incorporated behavior Jane Doe had attributed to the defendant. Using the characteristics of people described in these hypotheticals the agent presented the jury with her opinion of "the most prevalent type of behavior pattern" by a sex offender. (*Id*. at pp. 1082–1083.)

On appeal, the *Robbie* court concluded the DOJ agent's testimony constituted improper profile evidence. (*Robbie, supra,* 92 Cal.App.4th at p. 1084.) This testimony was profile evidence even though the agent was not directly asked to opine whether the defendant was a sex offender because the prosecutor incorporated Jane Doe's description of the defendant's conduct into the hypotheticals that the expert used to identify the characteristics of a sex offender. Furthermore, the profile evidence was inadmissible because it implied falsely that criminals and only criminals engaged in the specified behaviors when that same behavior would be consistent with a truly consensual encounter. (*Id*. at pp. 1085–1086.) Concluding that reversible error occurred, the *Robbie* court rejected the People's argument that the DOJ agent's testimony was admissible to dispel the common stereotype that all rapists are violent. As the court explained, an expert could properly "have testified that rapists behave in a variety of ways and that

there is no 'typical rapist.' " But that is not what happened. Instead, the DOJ agent "replaced the brutal rapist archetype with another image: an offender whose behavior pattern exactly matched defendant's." (*Id*. at p. 1087.)

In this court, appellant contends that Dr. Haverty did the same thing as the DOJ agent in *Robbie*—she purported to dispel the classic stereotype of a child molester as a dirty old man by replacing that image with a profile that matched appellant, i.e., a compassionate man who feels " 'emotionally congruent' " with children and forms special relationships with them that include "touching that does not involve physical force, intercourse, penetration, or oral sex."

We are not persuaded by appellant's argument. He parses statements from Haverty's testimony, ignores their context, and then strings them together to create the false impression that Haverty devised an alternative stereotype of a child molester. Moreover, appellant misconstrues the isolated statements upon which he relies. For example, Haverty rejected the commonly held notion that a person who sexually abuses children feels no compassion or affinity toward them, but she did not testify or imply that compassionate men who love children are child abusers. Viewed as a whole, Haverty's clear message was that adults who are sexually attracted to children do *not* fit any fixed profile.

By separate argument, appellant contends Haverty's testimony should have been excluded because some of her opinions were irrelevant. In his argument heading, appellant specifically objects to opinions about "the frequency and immutability of adult male sexual attraction to children." However, his substantive argument consists of a laundry list of complaints about allegedly irrelevant statements that Haverty made.

First, appellant forfeited these miscellaneous arguments by failing to object to any specific opinion Haverty offered at trial. In his reply brief, appellant takes the view that all of his objections to Haverty are preserved because he filed an in limine motion to preclude her from testifying. However, the only substantive objections made in appellant's pre-trial motion were that Haverty's testimony was profile evidence and that her opinions were irrelevant because she is a treatment provider and appellant was never

in treatment. When the trial court denied that in limine motion, it stated that objections to any specific opinion Haverty might be asked to give would be addressed during her testimony. Under these circumstances, it was incumbent on appellant to make any other relevancy objections he may have had during his trial, which he did not do.

Appellant attempts to avoid forfeiture by drawing a false analogy to *People v. Washington* (1989) 211 Cal.App.3d 207, 211. There, the trial court denied without prejudice a pre-trial motion to exclude impeachment evidence for the stated reason that it wanted to defer ruling until after the defendant testified. The defendant who neither testified nor renewed his motion to exclude the evidence was allowed to challenge the pre-trial ruling in his subsequent appeal. (*Ibid.*) Here, by contrast, the trial court made dispositive rulings on appellant's pre-trial objections to Haverty, and if appellant had any additional objections to her opinions he did not make them below, thus forfeiting review.

Second, appellant fails to recount accurately the opinions that he attributes to Haverty. For example, he states that Haverty testified that "sexual attraction to children is innate, immutable, and not treatable." This is not a fair summation of Haverty's testimony. She testified about research indicating that certain pedophilic proclivities may be innate, but she did not offer any definitive opinion on the subject. Moreover, she expressly testified that this condition is conducive to treatment.

Third, appellant's relevancy analysis is too generalized factually, and insufficiently supported by his string citations to out-of-state authority. His position appears to be that Haverty's testimony was inadmissible as a matter of law because it was not relevant to prove that appellant committed the specific charges. However, Haverty's testimony was not admitted for that purpose. Rather, the trial court ruled that Haverty's testimony would assist the jury by dispelling common misconceptions about a stereotypical child abuser. Our Supreme Court affirmed a similar discretionary ruling in *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299–1303, which we follow here.

C. Urquiza's Opinion About the Rarity of False Reports Was Admissible

Appellant next contends that his trial was "tainted" by the erroneous admission of Dr. Urquiza's specific opinion that false allegations of child sexual abuse are rare.

During pretrial proceedings, the trial court granted the prosecutor's motion to admit Dr. Urquiza's expert testimony without substantive discussion after defense counsel stated that he was familiar with Urquiza's opinions from the first trial and had no objections to them. The trial court then denied the prosecution's in limine motion to exclude or limit Dr. Ermshar's testimony, noting that weaknesses in her testimony could be exposed on cross-examination or by calling another expert to counter her. Later, the court addressed a separate defense motion to exclude allegedly irrelevant evidence of studies regarding the small percentage of false allegations of child sex abuse. The trial court denied the motion, accepting the People's argument that this data was relevant because of the defense argument that the boys were testifying falsely and to rebut Dr. Ermshar's testimony that children often make false accusations based on false memories. The court also ruled that the prosecutor could not use statistical evidence to argue appellant's guilt.

In this court, appellant continues to argue that evidence of the rarity of false reports of child sex abuse should have been excluded because it is not relevant to the question whether he committed these crimes but was likely used by the jury for exactly that purpose. In other circumstances we might be persuaded by this argument. Appellant cites cases from other jurisdictions that have not allowed convictions based on evidence of this type to stand. (See, e.g., *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737–739; *United States v. Azure* (8th Cir. 1986) 801 F.2d 336, 340–341.) But here, because the defense placed at issue the frequency with which children falsely allege sexual molestation, the prosecutor had a right to counter Dr. Ermshar with Dr. Urquiza's evidence. Appellant argues that Dr. Urquiza's testimony did not respond to Dr. Ermshar's because his statistics went to knowingly false testimony, while hers addressed a suggestible child's unintentionally false allegations. We think this is a distinction too fine. If the concern is to protect the jury from misusing statistical evidence as a form of vouching for the complaining witnesses' credibility, then both kinds of false reports matter. A child's reason for testifying to events that never occurred is irrelevant to the

question of whether that testimony is true. Perhaps for that reason, Dr. Ermshar's statistics addressed false allegations generally.

We also find that Dr. Urquiza did not violate the court's ruling precluding the use of this evidence as proof of guilt; he did not testify that he believed the Doe witnesses or that he thought appellant was guilty of anything. Like the other experts, he told the jury that he was not familiar with this case and that he had not drawn any conclusions about it.

Appellant contends separately that Urquiza's opinion on this topic lacked foundation because it was based on misleading statistics. However, he had the opportunity to make this point to the jury at trial through cross-examination and the testimony of his own expert. Indeed, appellant ignores the fact that Dr. Ermshar considered these same statistics when formulating her opinion that there is no definitive data about the rate of false reports of abuse.

Finally, appellant contends that permitting Urquiza to calculate the rarity of false reports of child sex abuse was error under *People v. Collins* (1968) 68 Cal.2d 319 (*Collins*). In that robbery case, a mathematics professor testified as an expert that there was a one-in-12-million chance that the defendants were not guilty. The expert made this calculation by assigning, without evidentiary support, certain probabilities to facts that the prosecutor ascribed to the robbery that defendants were accused of committing, and then applying a statistical principle known as the product rule, which states that "the probability of the joint occurrence of a number of mutually independent events is equal to the product of the individual probabilities that each of the events will occur." (*Id*. at p. 325, italics omitted.) The *Collins* court found that admitting this evidence was reversible error because "(1) The testimony itself lacked an adequate foundation both in evidence and in statistical theory; and (2) the testimony and the manner in which the prosecution used it distracted the jury from its proper and requisite function of weighing the evidence on the issue of guilt, encouraged the jurors to rely upon an engaging but logically irrelevant expert demonstration, foreclosed the possibility of an effective defense by an attorney apparently unschooled in mathematical refinements, and placed

the jurors and defense counsel at a disadvantage in sifting relevant fact from inapplicable theory." (*Id*. at p. 327)

Collins is inapposite. Dr. Urquiza's opinion regarding the rarity of false reports of sex abuse was not based on his own statistical calculations or assumed probabilities, but on scientific research. Furthermore, Dr. Urquiza did not use the research data to opine about whether appellant was guilty or about any other disputed issue at trial. Finally, the defense expert discussed the same studies to formulate her opinions. Thus, even if the topic should not have been addressed (by either expert), the error was harmless.

IV. Closing Argument

Appellant contends that the judgment must be reversed because the prosecutor committed prejudicial misconduct during closing argument.

A. Preliminary Considerations

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) In the present case, appellant does not accuse the prosecutor of deceptive or reprehensible methods, but he argues that his federal due process rights were nevertheless violated because the prosecutor made several improper remarks during his closing argument to the jury, which rendered the trial fundamentally unfair.

"[T]o preserve an appellate claim of prosecutorial misconduct, a defendant must make a timely objection at trial and request an admonition; otherwise, a claim is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Wilson* (2005) 36 Cal.4th 309, 337 (*Wilson*).) In the present case, defense counsel did not object to the prosecutor's allegedly improper comments. Appellant's rote arguments that admonitions would not have cured the perceived harms or were otherwise unnecessary is unsupported by factual analysis or citation to relevant

authority. Thus, appellant forfeited his claim of prosecutorial misconduct. However, because appellant makes the alternative claim that the failure to object to the prosecutor's arguments constituted ineffective assistance of counsel, we address his objections on their merits.

" 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*Wilson, supra*, 36 Cal.4th at p. 337.)

B. The Limited Number of Victims

Near the beginning of his closing argument, the prosecutor discussed the "fundamental" principle that the "[f]acts consist of evidence presented." In that context, he acknowledged that there were only nine alleged victims in this case notwithstanding that appellant had taught many other students, and there was no evidence about what appellant did to those other students. Then, counsel made the following statement: "So the point here is sometimes you do have to cut off an investigation and just go with what you have. But, more importantly, I return you to my analogy about jury service being like getting a box. What goes in is the law, the facts, and you keep your common sense, and you just decide what's in that box. Is what's in that box evidence of the crimes that are charged? That's what your task is about."[3]

Appellant contends this argument constituted misconduct because (1) the prosecutor referred to a fact not in evidence by telling the jury that law enforcement officials decided to curtail their investigation of appellant, and (2) by making this argument, the prosecutor encouraged the jury to speculate that more charges would have been brought against appellant if the investigation had not been curtailed.

A prosecutor commits misconduct by misstating material facts or relying on facts that are not in evidence. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95.)

[3] The prosecutor used this "box" analogy during jury voir dire to explain how a jury trial works and emphasize that the verdicts would have to be based on evidence and law that had been placed inside the box.

However, "[c]ounsel may argue facts not in evidence that are common knowledge or drawn from common experiences." (*People v. Young* (2005) 34 Cal.4th 1149, 1197.) Moreover, prosecutors have wide latitude to comment on the state of the evidence and to draw reasonable inferences or deductions. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.) " 'Whether the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*Wilson, supra*, 36 Cal.4th at p. 337.) We conclude that it is not reasonably likely the jury interpreted the challenged remarks in a way that violated these rules.

Throughout trial, the defense chastised the prosecution for failing to conduct a more thorough investigation. Defense counsel laid the foundation for this theory during his opening statement when he complained that the police only interviewed students who claimed they were victims. Defense counsel also told the jury that the defense located witnesses during its independent investigation who would testify that they never saw appellant touch a student in the ways alleged. The prosecutor's remark that the police investigation had been cut off was a fair response to these defense claims. It was also supported by the trial testimony of the police investigator assigned to this case, who explained to the jury why it would have been unreasonable and inappropriate to interview "hundreds" of former students of appellant.

Referring to facts not in evidence constitutes misconduct when the prosecutor has essentially acted as his own witness by "offering unsworn testimony not subject to cross-examination." (*People v. Hill* (1998) 17 Cal.4th 800, 828.) That did not happen in this case. The adequacy of the investigation into the charges against appellant was put at issue by the defense. The prosecutor argued that the investigation was adequate to prove the charges, which was a fair comment on the evidence. Furthermore, the prosecutor did not state or imply that if the investigation had continued, more victims would have been found. Instead, he expressly urged the jury to limit their inquiry to the evidence in their "box," thus urging them *not* to speculate or consider facts outside the trial record.

C. Failure to Call Defense Witnesses

During another part of his closing argument, the prosecutor challenged the defense theory that if appellant had engaged in inappropriate touching, other students in the class

would have seen it. The prosecutor argued there were reasons other students may not have noticed what was going on. He also pointed out that former students who were called by the defense to testify at trial admitted that they *did* see appellant touch other students. In the course of this argument, the prosecutor made the following statement:

"You're gonna hear about this. There's no evidence that they interviewed everybody. They brought in a couple—about five or six or seven from the 5th grade class. One was Marilyn [M.]. And [defense counsel] says, 'You ever see [appellant] put his hand down a shirt?' 'I think maybe I did.' And she didn't come off that. 'I think maybe I did.' That's their witness. Both she and Andrea [S.] said [they] saw him massaging our three victims in the movie time. [¶] Pretty—pretty interesting now. I wonder if everybody was pulled in what they would be saying. [Defense counsel's] assertion is: Oh, these kids would be reacting. You know, 'Oh my God, your hand's down the shirt.' "

Appellant contends these remarks encouraged the jury to speculate that uncalled witnesses would have testified that appellant abused them. Again, we disagree. Most of the argument was directed at actual defense witnesses. Furthermore, the part of this argument referring to former students who did not testify was a fair response to the defense claim that its investigation was more comprehensive and reliable than the police investigation.

D. Witnesses Who Were Interviewed but Did Not Testify

During his rebuttal, the prosecutor addressed an argument made by defense counsel during his closing argument that the detective in charge of investigating this case was incompetent, that she failed to interview witnesses, and that there "was no real investigator in this case." The prosecutor questioned whether there were other things the detective could have done that would have made any difference. He noted that the failure to interview all of the children who had been appellant's students was a "big issue" for defense counsel, but he countered that (1) most of the charges involved conduct that occurred when class was not in session; and (2) there were many reasons why students may not have seen improper touching that occurred during class time. In response to a

defense complaint that student interviews should all have been completed more quickly, before rumors spread, the prosecutor argued that forcing all the 5th graders to submit to interviews at the Child Interview Center would have been a "big deal," which was something the detective had discussed during her testimony. Also, the circumstances did not demand quick action because the children all lived in the neighborhood and were not just going to disappear. Then the prosecutor made the following statement:

"[Defense counsel] was [appellant's] attorney before his arrest. [Appellant] knows all the students. He can find them. Not hard to track them down. [Defense counsel], in his opening, said, 'We interviewed them.' Who did he interview? And what did they say? Because if [Defense counsel's] investigator went and interviewed a child from 5th grade and said, 'Here's a picture. Did you ever see [appellant] doing this?' and that child said, 'Yes,' we don't have to find out about it. Never know. Unless we go talk to that child. [Defense counsel] said, 'We interviewed them.' "

Appellant contends these remarks were improper because they urged the jury to speculate that the defense was hiding evidence favorable to the prosecution. Not so—this argument addressed the state of the evidence and the defense claim that it interviewed witnesses who were not consulted as part of the police investigation. The defense theory was that the prosecution ignored relevant potentially exculpatory evidence. In disputing this theory, the prosecutor implied that students the defense interviewed but did not call as witnesses did not have information supportive of appellant's defense. This was an inference that the jury could have drawn from the state of the evidence.

Appellant relies on *People v. Gaines* (1997) 54 Cal.App.4th 821. In that case, the prosecutor committed misconduct during closing argument by telling the jury why a specifically identified percipient witness "did not testify and what the testimony of that witness would have been." (*Id*. at p. 822.) Here, by contrast, the defense argued that the prosecution ignored relevant witnesses. The prosecutor's argument that the trial evidence did not support this defense claim was a fair comment on the state of the evidence.

E. The Prevalence of Adult Sexual Attraction to Children

During part of his closing argument, the prosecutor challenged the idea that "a man who is good and spiritual and who seems to truly care for children" could not be a child molester. The prosecutor urged the jury to consider Dr. Haverty's testimony, which addressed the flaws in this misconception. Then the prosecutor made the following statement:

"One of the things [Haverty] testified to was that the research shows, and it's her opinion, that in this population between 1 and 5 percent of men have a sexual attraction to children. That's between 1 and 20 out of every 100 men. I'm not using that to say, 'Oh, the percentage is great and, therefore, [appellant] must be a child molester.' Not at all. I'm just trying to open your eyes that there's probably people that you know, maybe not well, walking around that have this problem, and they keep it a secret. Many people can't keep a secret. They get caught." The prosecutor stated that the point of Haverty's testimony was to explain that there is no stereotype of a child molester, "no way to predict based on, you know, status, occupation, who's going to have this problem."

The prosecutor returned to this theme when discussing the law pertaining to the commission of a lewd act with a child. Expressing concern that the jury might conclude erroneously that the level of touching alleged in this case was not sufficiently egregious to prove the charges, the prosecutor suggested various examples to illustrate that people can be motivated sexually by conduct or things that in other contexts would be innocuous. He used photographs to demonstrate the range of people who can be considered sexually attractive. Referring to a photograph of a boy, he said "Believe it or not, there are men, one to five percent of our population, who are turned on by this boy, just like people are turned on to these adults. It's hard to accept, but that's the truth." The prosecutor acknowledged that "[a] lot" of these men might just look at the picture and not do anything else, but he argued that other "[m]en molest children because of their sexual compulsion." He cautioned the jury, "if you think it's really uncommon, I'm just gonna say, not disrespectfully, but open your eyes. This happens all the time. It's extremely common—not extremely. It's common. It's a problem in our society, and

some other societies even more than ours. Brothers, fathers, grandfathers, uncles, neighbors, family friends, babysitters, coaches, doctors, lawyers, priests, pastors, C.E.O.s, laborers, and yes, teachers. All walks of life."

Appellant first contends this series of remarks was misconduct because it capitalized on Haverty's testimony about the profile of a sex offender, which was inadmissible. However, we have already explained that Haverty's testimony was not profile evidence and was admissible. The prosecutor did not commit misconduct by discussing that evidence during his closing.

Appellant also points out that the prosecutor misstated the evidence about the percent of men who have a primary sexual orientation toward children. When the prosecutor referenced data showing that 1 to 5 percent of men have this proclivity, he stated erroneously that this meant that between 1 and 20 out of every 100 men has a sexual attraction to children. The prosecutor may have misspoken, meaning to say between 1 and 5 out of every 100 men, but there is no dispute that the calculation he shared with the jury was inaccurate.

Because appellant did not object to this erroneous statement at trial, he cannot secure reversal of the judgment absent a showing that the failure to object violated his right to the effective assistance of counsel. To make that showing, appellant would have to demonstrate that his trial counsel's representation fell below an objective standard of reasonableness resulting in a degree of prejudice that undermines our confidence in the outcome of this case. (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437.)

On this record, appellant cannot establish either element of an ineffective assistance claim based on the failure to object to the prosecutor's erroneous statement. The miscalculation was so glaring that it would be obvious to anybody who considered it, but it was a very minor point made during arguments that consumed more than an entire court day. Moreover, defense counsel could have decided reasonably that making an objection would have drawn more attention to the actual statistic. (See *People v. Lopez* (2008) 42 Cal.4th 960, 972 [whether to object during counsel's argument " 'is inherently tactical, and the failure to object will rarely establish ineffective assistance' "].)

Even if there was no tactical reason to ignore the miscalculation, appellant has not demonstrated prejudice. He contends that this was a close case, as demonstrated by: (1) the fact that the jury struggled during deliberations and failed to reach verdicts on five counts; and (2) the fact that "the case boiled down to a credibility contest" between appellant and the John Does. Under these circumstances, appellant contends, any substantial error favoring the prosecution was necessarily prejudicial. (Citing *People v. Jandres* (2014) 226 Cal.App.4th 340, 360.)

The fact that the jury convicted appellant of some charges but not others indicates reasoned and careful deliberations but is not indicative of a struggle to determine whether appellant committed lewd acts against some children. Further, the jury verdicts are inconsistent with material aspects of appellant's trial testimony, thus conveying the clear message that the jury determined appellant was not credible. Finally, the guilty verdicts were also supported by strong circumstantial evidence, which included testimony from two witnesses affiliated with a church group called "For Men Only" that helps men deal with sexual addictions. These witnesses testified, among other things, that appellant joined this church group and admitted he had a sexual attraction to young boys.

Finally, even if this case could be considered close, the prosecutor's erroneous statement was not material and its connection to the credibility contest was tenuous. The dispute in this case was not whether there are men with a sexual attraction to children, but whether appellant acted on his attraction by committing lewd conduct against the John Does. Even if there had been no mention of the statistic, it is not reasonably probable the outcome of this case would have been more favorable to appellant.

V. Disposition

The judgment is affirmed.

_____
Tucher, J.

We concur:

_____
Pollak, P.J.

_____
Streeter, J.